

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARYANN P. DeGUZMAN and U.S. POSTAL SERVICE,
POST OFFICE, Petaluma, CA

*Docket No. 01-823; Submitted on the Record;
Issued September 25, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

This is the third appeal in the present case. In the first appeal, the Board issued a decision¹ on September 13, 1996 in which it affirmed the October 15, 1993 and May 4, 1994 decisions of the Office on the grounds that appellant did not meet her burden of proof to establish that she sustained a back injury in the performance of duty. In July 1990, appellant, then a 35-year-old distribution clerk/timekeeper, filed a claim alleging that she sustained a back injury² at work over time due to lifting, carrying, bending and stooping in order to lift, box, sort and distribute mail; she also claimed that her condition was caused by sitting in a chair with inadequate back support between 1984 and 1988.³ The Board determined that appellant did not submit sufficient rationalized medical evidence to establish that she sustained an employment-related back injury.⁴ The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

¹ Docket No. 94-2454.

² Appellant indicated that she first realized that she had sustained an employment-related occupational injury in mid 1986.

³ Appellant's positions for the employing establishment included working as a letter carrier (1974 to 1977); distribution clerk/mailhandler (1977 to 1979); and distribution clerk/timekeeper (1979 to 1989). She was required to lift up to 70 pounds of mail. Appellant noted that for 5 or 6 years prior to stopping work in December 1989 about 75 to 80 percent of her work duties were sedentary in nature and involved such administrative tasks as answering telephones and doing paperwork.

⁴ Appellant filed a petition for reconsideration of the Board's September 13, 1996 decision, which was denied by the Board in an order dated June 4, 1997.

On June 4, 1998 appellant filed a request for reconsideration of the prior merit decisions. By decision dated July 8, 1998, the Office denied appellant's request for merit review on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

Appellant again appealed her case to the Board and, by decision⁵ dated October 13, 2000, the Board set aside the Office's July 8, 1998 decision and remanded the case to the Office for further proceedings. The Board found that appellant's June 4, 1998 reconsideration request was untimely, but that the Office had improperly failed to review a 13-page document which it received on June 23, 1998, *i.e.*, at a time prior to the issuance of its July 8, 1998 decision.⁶ The Board remanded the case to the Office for full consideration of the evidence appellant submitted with her untimely reconsideration request to be followed by an appropriate decision. By decision dated November 14, 2000, the Office denied appellant's request for merit review on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's November 14, 2000 decision denying appellant's request for a review of the last merit decision dated September 13, 1996. Because more than one year has elapsed between the issuance of the prior merit decisions and February 8, 2001, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the prior merit decisions.⁷

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁸ the Office's regulations provide that a claimant must (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁹ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.¹⁰ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to

⁵ Docket No. 99-2319.

⁶ Appellant submitted the 13-page document after she initially submitted a shorter document, which was missing portions of its text.

⁷ See 20 C.F.R. § 501.3(d)(2).

⁸ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.606(b)(2).

¹⁰ 20 C.F.R. § 10.607(a).

reopen a case for further consideration under section 8128(a) of the Act.¹¹ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.¹²

In its November 14, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The last merit decision of record was issued on September 13, 1996 and appellant's request for reconsideration was dated June 4, 1998, more than one year after September 13, 1996.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."¹³ Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹⁵ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹⁶ Evidence, which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁸ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of

¹¹ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

¹² *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

¹³ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein states: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical reports which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

¹⁵ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁶ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁷ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁸ *See Leona N. Travis*, *supra* note 16.

¹⁹ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.²⁰ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office, such that the Office abused its discretion in denying merit review in the face of such evidence.²¹

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decisions were in error.²²

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of the Office's prior decisions and is insufficient to demonstrate clear evidence of error.

In support of her untimely reconsideration request, appellant presented a number of arguments. She argued that the Office did not consider all the relevant evidence in that documents were missing from the case record. Appellant claimed that a number of pages were missing from the case record, including a September 16, 1993 report of Dr. Mark A. Miller, an attending chiropractor, and two pages of an undated report²³ of Dr. Santiago O. Carin, an attending physician specializing in orthopedic surgery.²⁴ The Board has reviewed the case record and notes that the pages identified by appellant, including those containing the aforementioned medical reports, are present in the case record. Moreover, in its decisions, the Office identified and discussed the relevant medical reports of record, including the September 16, 1993 report of Dr. Miller and the undated report of Dr. Carin received by the Office on November 22, 1991.

Appellant claimed that the Office failed to give proper weight to the opinions of Drs. Carin and Miller. However, the Board has reviewed the Office's decisions and notes that the Office analyzed the relevant medical evidence, including the evidence of Drs. Carin and Miller and considered its probative value. The Office concluded that the opinions of Drs. Carin and Miller, as well as the other medical opinions of record, were not sufficiently well-rationalized to show that appellant sustained an employment-related occupational injury. The main issue of the

²⁰ *Leon D. Faidley, Jr.*, *supra* note 12.

²¹ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

²² The Office properly reviewed all the relevant evidence submitted by appellant in support of her reconsideration request, including the initial submission of June 4, 1998 and the 13-page document received by the Office on June 23, 1998.

²³ The report was received by the Office on November 22, 1991.

²⁴ Appellant further asserted that the Office violated federal regulations by "failing to uphold the integrity" of the case record.

present case is medical in nature and appellant's mere statements that the Office improperly weighed the medical evidence would not be sufficient to show that the Office committed error in its prior decisions.²⁵ She suggested that the Office did not consider that her preexisting low back condition was aggravated by employment factors. A review of the Office's decisions reveals that the Office considered and denied this aspect of her claim. Appellant also claimed that the Office did not "give proper weight" to her factual history. The Board notes that, in its decisions and statements of accepted facts, the Office discussed appellant's factual history including her job duties and work conditions; the Office essentially accepted the work factors as they were reported by appellant.²⁶

For these reasons, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated November 14, 2000 is affirmed.

Dated, Washington, DC
September 25, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

²⁵ Appellant claimed that there were no medical opinions of record contrary to those of Drs. Carin and Miller. She did not adequately articulate the relevance of this assertion or explain how it showed that the Office committed error in its prior decisions.

²⁶ Appellant submitted documents, which had already been considered by the Office, but these would not show that the Office committed error in its prior decisions. She also asserted that the Board committed errors in its September 13, 1996 decision and in its June 4, 1997 order denying her petition for reconsideration of the September 13, 1996 decision. However, the subject of the present appeal relates to whether appellant has shown, in her untimely reconsideration request, that the Office has clearly erred in its prior decisions, as defined by the above-detailed standards; *see supra* notes 13 through 21 and accompanying text.